Supreme Court, U.S.
FILED

04 319 JUL 14 2004

OFFICE OF THE CLERK

No.

In The Supreme Court of the United States

AMIN QAMRUDDIN LALJI,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL, TOM RIDGE, SECRETARY, DEPARTMENT OF HOMELAND SECURITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RECEIVED
SEP 8 - 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHRISTOPHER WILLIAM HELT
Counsel of Record
HELT LAW OFFICES
325 West Huron Street
Suite 515A
Chicago, Illinois 60610
(312) 266-0531

Attorney for Petitioner

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

QUESTION PRESENTED FOR REVIEW

I. Whether the Attorney General and the Executive Branch has the power to affirm, without written opinion, decisions of the Board of Immigration Appeals, a federal administrative tribunal.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list represents all parties before the United States Court of Appeals for the Eleventh Circuit:

Petitioner Amin Qamruddin Lalji was the petitioner/appellant below. John Ashcroft, Attorney General, and Tom Ridge, Department of Homeland Security were appellees below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 7

I. The Attorney General Does Not Have Authority To Affirm, Without Written Opinion, Decisions of A Federal Administrative Tribunal 7

A. Summary Affirmance Is Unconstitutional and Violates Due Process 7
1. History of the Board of Immigration Appeals .. 7
2. The Exponential Growth of the BIA's Caseload and the Success of the Recently Implemented "Streamlining" Initiative 10

B. The BIA's Authority to Affirm IJ Decisions Without Opinion 10

II. The Statutory Right To Reasons 12
III. The Constitutional Right To Reasons 12
IV. The Rule 10 Bases For Review 14
V. The Important Question of Federal Law That Has Not Been, But Should Be, Settled by This Court 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Addington v. *Texas*, 441 U.S. 418 (1979) 14

Albathani v. INS, 318 F.3d 365, 2003 U.S. App. LEXIS 2146 (1st Cir. 2003) 14

Arango-Aradondo v. INS, 13 F. 3d 610, 613 (2d Cir.1994) 14

Batalova v. Ashcroft, 355 F.3d 1246, 1253-54 (10th Cir. 2004) 18

Beboruno v. Ashcroft, (4th Cir. March 29, 2004) 15

Blagoev v. Ashcroft, 354 F.3d 652, 2004 WL 32920 (7th Cir. January 7, 2004) 16

Chae Chan Ping v. United States, 130 U.S. 581 (1889) 7

Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 467 (1981) 13

Dia v. Aschcroft, No. 02-2460, 353 F.3d 228 (3d Cir. 2003) 15

Denko v. INS, No. 02-3746, 2003 U.S. App. LEXIS 24605 (6th Cir. Dec. 8, 2003) 16

Dominguez v. Ashcroft, 336 F.3d 678 (8th Cir. 2003) 17

Dunlop v. Bachowshi, 421 U.S. 560 (1976) 13

El Moraghy v. Ashcroft, 332 F.3d 195 (1st. 2003) 14

Falcon Carriche v. Ashcroft, 335 F.3d 1009 (9th Cir. 2003) 17

Georgis v. Ashcroft, 328 F.3d 962 (7th Cir. 2003) 16

Goldberg v. Kelly, 397 U.S. 254 (1970) 12, 13, 18

Gonzalez-Oropeza v. U.S. Attorney General, 321 F.3d 1331 (11th Cir. 2003) 18

Goss v. Lopez, 419 U.S. 565 (1975) 13

Hamdi et al. v. Rumsfeld, Secretary of Defense et al 03-6696 (July 10, 2004) 14

Haoud v. Ashcroft, No. 02-2395, 2003 U.S. App. LEXIS 23993 (1st Cir. Nov. 23 2003) 14

Khattak v. Ashcroft, 332 F.3d 250 (4th Cir. 2003) 15

Harris v. Rivera, 454 U.S. 339, 344 (1981) 13

Mendoza v. U.S. Attorney Gen., 327 F.3d 1283, 1289 (11th Cir. 2003) 4, 18

Moin v. Ashcroft, 335 F.3d 415 (5th Cir. 2003) 16

Morrissey v. Brewer, 408 U.S. 471 (1972) 13

Niam v. Ashcroft, 354 F.3d 652 (7th Cir. 2004) 16

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 19

Soadjede v. Ashcroft, 324 F.3d 830 (5th Cir. 2003) 16

Yamataya v. Fisher, 189 U.S. 86 (1903) 19

Wolff v. McDonnell, 418 U.S. 539 (1974) 13

Zadvydas v. Davis, 533 US 678 (2001) 14, 19

Zhang v. Ashcroft, No 03-70834, 2004 US App. LEXIS 719 (2d Cir. March 24, 2004) *14*

APPENDIX

Appendix A—Opinion of the Board of Immigration Appeals 1a

Appendix B--Opinion of The United States District Court for Eleventh Circuit Filed April 15, 2004 ..... 3a

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Amin Qamruddin Lalji and his wife, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the Untied States Court of Appeals for the Eleventh Circuit entered into this proceeding on April 15, 2004.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Lalji vs. Ashcroft* (Pet. App. 3a) is reported at 03-11126-FF. The memorandum and order of the district court is unreported.

JURISDICTION

The Judgment of the court of appeals was entered on April 15, 2004 denying the Petition for Review. Pursuant to Supreme Court Rule 13.1, this petition has been filed within ninety days of the denial of the Petition for Review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portion of the due process clause, U.S. Const. amend. V., is set out below.

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

Code of Federal Regulations

8 C.F.R. § 1003.1(a)(7) (ii)(A)
8 C.F.R. § 3.1(a)(7)

Other Authority Cited

4 Debates Resolutions and Other Proceedings, in Convention on the Adoption of Federal Constitution 556 (Johnathan Elliot, 2nd ed. 1836).

Statement of Board of Immigration Appeals Chairman Lori Scialabba in Letter to Editor of Los Angeles Times. January 9, 2003.

STATEMENT OF THE CASE

Petitioner Amin Qamruddin Lalji and his wife are citizens of the Islamic Republic of Pakistan, who entered the United States without inspection on January 7, 1999. The next day, on January 8, 1999 the Immigration and Naturalization Service[1] issued forms I-862, Notices to Appear, alleging that the petitioners were subject to removal under § 212(a)(6)(A) of the Immigration and Nationality Act ("the Act"). Thereafter, petitioner filed applications for

[1]On March 1, 2003, functions of several border and security agencies, including certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service, were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 451(b), 116 Stat. 2192, 2196 (to be codified at 6 U.S.C. 251(2), 271(b)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) (Justice Department implementing regulations as recodified after Homeland Security Act).

political asylum, withholding of removal and protection under the Convention Against Torture. On August 7, 2001, the Immigration Judge denied Petitioner's application for asylum, withholding of removal and denied his request for torture convention protection. The judge then issued a removal order against the Petitioner and his wife, designating Pakistan as the country of removal. Petitioner then timely filed an appeal with the Board of Immigration Appeals ("BIA"). On February 6, 2003 in a panel composed of only one Board member, the BIA summarily affirmed, without opinion, the decision of the Immigration Judge. Recently, the Attorney General announced changes in the way immigration appeals are handled. Eleven of the twenty-three Board members were terminated[2] and a new a procedure codified in the federal register at 64 Federal Register 56, 135 was enacted. Codified at 8 C.F.R. Section 3.1(a)(7), this appellate procedure permits a single appellate adjudicator to issue a binding decision without an opinion. Prior to the Attorney General's modification in October 1999, the BIA was required to have at least three individual board members review each case that was appealed. 64 FR 56, 135. Additionally, the BIA was required to issue a

[2] On Jan. 5,2003, the *L.A. Times* reported that BIA members had been deciding cases in minutes, often issuing two-line decisions, and that in Oct. 2002, 86 percent of all rulings on appeals were going against immigrants compared to a 59 percent rulings-against rate at the same time a year before. According to the *Times*, some Board members were deciding 50 cases a day. On Mar. 12, 2003, *Los Angeles Times* reported that the attorney general's Sept. 2002 issuance of a final rule provides that the BIA would be reduced from 23 to 11 members after a 6-month transitional period. During that period, the BIA's substantial case backlog was to be reduced. The reduction in the BIA's size is just one component of the rule's provision for "streamlining" BIA procedures, which also includes eliminating the BIA's jurisdiction to review factual findings *de novo*, making most appeals subject to review by a single Board member rather than a 3-member panel, making it easier to summarily dismiss appeals, allowing immigration judges' decisions to be affirmed without a BIA opinion, and setting strict time limits for deciding cases

detailed decision that outlined the pertinent legal issues before the BIA. *Id.* On August 26, 2002, the Attorney General made additional regulatory modifications to the BIA's procedure, limiting review of findings made by immigration judges (67 FR 54, 878). Under the current regulatory scheme now in effect, the BIA may review matters of law, discretion, and judgment *de novo*, but can only review factual determinations if clearly erroneous. *Id.*

Petitioner then sought review of the summary affirmance decision by the BIA by the filing of a petition for review, challenging the constitutionality of the appellate body's way in which it handled Petitioner's appeal. On April 15, 2004, the 11th Circuit Court of Appeals denied the petition, holding that his "constitutional claims fail." (Opinion, p. 8). The Court further held that the application of the BIA's "summary affirmance procedure, 8 C.F.R. § 1003.1(a)(7)(ii)), does not violate an alien's due process rights . . ." *Id.* The Court of Appeals held that "an alien has neither a constitutional nor a statutory right to an administrative appeal." Citing *Mendoza v. U.S. Attorney Gen.*, 327 F.3d 1283, 1289 (11th Cir. 2003). The Court of Appeals further held that the retroactive application of the new streamlined procedures was constitutional and did not violate Petitioner's due process rights, stating that the procedure was "nothing more than a procedural change" and that the petitioner did not support his contention that the new procedure, namely review by a single BIA member, "would result in a less accurate result."[3] *Id.* at 9.

---

[3] The American Bar Association, however, has recently called on the Justice Department to adopt a series of changes in order to unclog federal court dockets and ensure due process for immigrants and their families. ABA review of a study on the impact of the procedural changes at the BIA, undertaken pro bono by Dorsey and Whitney LLP at the request of the ABA Commission on Immigration Policy, Practice and Pro Bono concluded that changes should be made. While the "Study of Board of Immigration

Appeals Procedural Reforms to Improve Case Management" represents the views of the authors and editors and has not been adopted as policy by the ABA House of Delegates, the findings of the study confirm concerns that the ABA has had from the time the changes were proposed, and about which the ABA has communicated with the Department of Justice. "This study concludes that changes billed as simple procedural matters are having a serious and sweeping effect on the administration of justice," ABA President Dennis W. Archer has stated. "After reviewing it, the ABA is recommending that the Department of Justice quickly discard the procedural changes and reinstate prior procedures." Id. While the Eleventh Circuit found that Petitioner "has not suffered substantial prejudice" due to Appellate procedure, the ABA reports that while 1 in 4 appeals were granted before the procedural changes, just 1 in 10 are now. In addition, The ABA reported that:

- the rate at which BIA decisions are being appealed to the federal courts tripled from 5 percent in 2001 to 15 percent in 2002. The 2nd, 9th, 5th and 3rd Circuits have been particularly hard hit by higher rates of appeals;

- Reducing the number of BIA members who must review each case and imposing strict time periods for decision-making, measures purportedly aimed at eliminating the backlog, have backfired. Overworked appeal board members have insufficient time to carefully consider the facts and legal arguments of each case;

- Allowing affirmance without written decision creates a clear incentive for board members to meet case processing guidelines by affirming removal orders without regard to the merits of the appeal. Board members are not required to articulate the basis for their decisions. The lack of written decisions gives courts of appeal less guidance in reviewing decisions; and

- Massive changes in immigration law, not lack of diligence or efficiency by individual board members, played a large part in the increased backlogs between 1996 and 2002. Thus, the rationale underlying the procedural reforms is questionable.

Esther Lardent, chair of the ABA Commission on Immigration Policy, Practice and Pro-Bono has noted that "The results of the study show those concerns were well-founded, and we are calling on the Department of Justice to make the changes needed to ensure

justice for newcomers to our country." After its review of the study, the ABA Commission prepared a report, also not adopted as ABA policy, which concludes, as a minimum, that the following modifications are necessary if the Board of Immigration Appeals does not discard the 2002 procedures:

- Require that each case have a written decision that addresses errors raised by the appellant, the basis for determining that the case was correctly decided below, specific legal precedents on which the decision is based, and the reason that the case was assigned to a single board member;

- Prohibit single-member review in cases where judicial review would be foreclosed;

- Prohibit single-member review for reversing an order of an immigration judge to terminate proceedings or grant relief to a non-citizen;

- Make available reconsideration of whether or not a case was appropriately decided whenever a removal order is affirmed by a single member;

- Allow de novo review, which allows the board to re-examine the facts, clear up any factual errors, mistakes or confusion, and decide a case on its true facts. De novo review also would reduce the pressures on the federal courts;

- Ensure that time frames sufficiently accommodate the practical impediments many respondents face in preparing briefs or finding counsel;

- Expand board membership, rather than reduce it;

- Ensure decisional independence of board; and

- Preserve access to judicial review of immigration decisions, as the federal courts provide important oversight.

REASONS FOR GRANTING THE WRIT

I. The Attorney General Does Not Have Authority To Affirm, Without Written Opinion, Decisions of A Federal Administrative Tribunal.

A. Summary Affirmance Is Unconstitutional and Violates Due Process

The government cannot hide behind the cloak of plenary power with actions intending to remove aliens from the United States, in violation of due process. The 'plenary power doctrine' originated in The Chinese Exclusion Case (*Chae Chan Ping v. United States),* 130 U.S. (1889). That case involved a Chinese laborer who, in 1887, had obtained a certificate permitting him to reenter the United States. The Court held that he had no right to challenge his subsequent exclusion from the country as a result of an 1888 statute that voided previously obtained certificates. Writing for the majority, Justice Field averred that Congress' power to pass legislation to exclude non-citizens, "is a proposition which we do not think open to controversy." *Id.* at 603. The ramifications of such a holding are wide- sweeping, as the Court concluded that the federal power to exclude non-citizens was an inherent attribute of sovereignty, extra-constitutional, essentially unchallengeable by anyone, and unreviewable by the judicial branch. *Id.* at 604, 609.

1. History of the Board of Immigration Appeals

The petitioner here challenges the manner in which the government has handled his deportation case. The EOIR, the entity that has entered a deportation order against him, was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization that combined the BIA with the Immigration Judge (IJ) function previously

performed by the Immigration and Naturalization Service (INS)[4]. Along with establishing EOIR as a separate agency within the DOJ, this reorganization made the immigration courts independent of the INS, the agency charged with enforcing federal immigration laws. The EOIR also is separate from the Office of Special Counsel for Immigration-Related Employment Practices in the Department of Justice Civil Rights Division and the Office of Immigration Litigation in the DOJ Civil Division. As an office within the DOJ, the EOIR is headed by a Director who reports directly to the Deputy Attorney General.

Under authority delegated by the Attorney General, the EOIR administers and interprets federal immigration laws and regulations through the conduct of immigration court proceedings, appellate reviews, and administrative hearings in individual cases. The EOIR carries out these responsibilities through its three main components: The BIA is the highest administrative body for interpreting and applying immigration laws. It is composed of 23 Board Member positions (four vacancies currently exist), including the Chairman and two Vice Chairmen who share responsibilities for Board management.

As historical background, a Board of Review functioned within the Department of Labor between 1922 and 1940 and was empowered with reviewing immigration cases and making recommendations to the Secretary of Labor as to their disposition. In 1940, the administration of immigration affairs was transferred to the DOJ, and the Board of Review was replaced with the Board of

---

[4] Posted on American Immigration Lawyers Association website, InfoNet at Doc. No. 02020633 (Feb. 6, 2002). Statement of Stephen Yale-Loehr, American Immigration Lawyers Association (AILA) on The Operations of the Executive Office for Immigration Review (EOIR), AILA Testimony on BIA Reform.

Immigration Appeals. The new Board was empowered to render final administrative decisions in such matters, subject only to possible review by the Attorney General. As noted above, the 1983 reorganization created the EOIR and placed the BIA under the umbrella of that office.

The BIA never has been recognized by statute, and is entirely a creature of the Attorney General's regulations. It is completely independent of the (former) INS (now DHS), and accountable directly to the Attorney General through a separate chain of command.

The Board has nationwide jurisdiction to hear appeals from decisions rendered by immigration judges and District Directors of the (former) INS (now USCIS) in a wide variety of proceedings in which the Government of the United States is one party and an alien, a citizen, or a business firm is the other party. In addition, the Board is responsible for the recognition of organizations and accreditation of representatives requesting permission to practice before INS, the Immigration Courts, and the Board. Decisions of the Board are binding on all INS officers and IJs unless modified or overruled by the Attorney General or a federal court. The majority of appeals reaching the Board involve orders of removal and applications for relief from removal. Other cases before the Board include the exclusion of aliens applying for admission to the United States, petitions to classify the status of alien relatives for the issuance of preference immigrant visas, fines imposed upon carriers for the violation of immigration laws, and motions for reopening and reconsideration of decisions previously rendered. *Id.*

2. The Exponential Growth of the BIA's Caseload and the Success of the Recently Implemented "Streamlining" Initiative

Annual appeals filed with the BIA have increased ten-fold since 1984. According to statistics from the EOIR, in fiscal year (FY) 1984 the Board received fewer than 3,000 cases; in 1994, more than 14,000 cases; and in 2000, nearly 30,000 cases. In addition, the BIA now reviews the decisions of over 200 immigration judges across the country, up from 69 judges in 1990 and 86 in 1994.

The BIA has grappled with its burgeoning caseload in several ways. Since 1995, it has expanded the number of permanent Board Members on several occasions, growing from five permanent positions to the current 23 Board Member positions, four of which remain vacant. Significant staff increases have accompanied the expansion of the Board.

B. The BIA's Authority to Affirm IJ Decisions Without Opinion

The Board's authority to affirm the IJ's decision without writing an opinion derives from 8 C.F.R. §3.1(a)(7). That so-called "streamlining" regulation says, in its entirety:

> (7) Affirmance without opinion. (i) The Chairman may designate, from time-to-time, permanent Board Members who are authorized, acting alone, to affirm decisions of Immigration Judges and the Service without opinion. The Chairman may designate certain categories of cases as suitable for review pursuant to this paragraph.

(ii) The single Board Member to whom a case is assigned may affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or

(B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

(iii) If the Board Member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 3.1(a)(7)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the Immigration Judge or the Service were harmless or nonmaterial.

(iv) If the Board Member determines that the decision is not appropriate for affirmance without opinion, the case will be assigned to a three-Member panel for review and decision. The panel to which the

case is assigned also has the authority to determine that a case should be affirmed without opinion.

II. The Statutory Right To Reasons

Individuals in removal proceedings are granted the right to appeal the decision of an immigration judge and have that decision reviewed by the Board of Immigration Appeals. Neither this Court, nor, apparently any other have considered what must be minimally provided to individuals to satisfy this statutory right to appellate review. There is academic concern, however, that the use by the BIA of decisions without opinions—does not contain any statement of that appellate body's rationale. Moreover, the circuit courts have transformed themselves, contrary to congressional mandate, into appellate bodies for immigration appeals.

This Court should grant review to establish the limits imposed by on the BIA's authority to issue decisions without opinions that contain no statement, however brief, of the Board's rational.

III. The Constitutional Right To Reasons

The authority of the BIA flows from the Executive Branch. The President, through the Attorney General, has the authority to vacate decisions of the BIA, and issue his own opinion, for example. However, when the Court has considered challenges to decisions by officers of the Executive Branch, it has found that an essential part of the due process requires within that decision a statement of the reasons for the officer's decisions. See, e.g. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (holding that statement of reasons for decision is one of "minimal procedural requirements" to justify termination of welfare benefits);

Morrissey v. Brewer, 408 U.S. 471 (1972) (holding that due process requires statement of reasons for parole revocation); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that due process requires statement of reasons for revocation of inmate's good time credits); *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (requiring statement of reasons for suspension of student from school). It is only when the executive officer is granted "unfettered discretion" in making her decisions that the Court has not recognized a due process obligation to articulate reasons for the officer's decisions. *See Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981). In imposing a "reasons" requirement on executive officers, the Court has recognized that such a requirement operates instrumentally to help ensure that the decisions reached by the officer, in this case, a Board Member, are rational. *See Wolff v. McDonnell*, 418 U.S. 539, 565 (1975); *Goldberg v. Kelly*, 387 U.S. 254, 271 (1970); *see also Dunlop v. Bachowshi*, 421 U.S. 560, 572 (1976) ("A 'reasons' requirement promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies."). This Court has recognized that "there are occasions when an explanation of the reasons for a decision may be required by the demands of due process." *Harris v. Rivera*, 454 U.S. 339, 344 (1981). The Court, however, has not stated when such occasions should be recognized, and the circuit courts are presently disposing of large numbers of appeals by means of simply incorporating the decision of the immigration judge as if it were the decision of the Board of Immigration Appeals, a construct which is not true. The purpose of this appellate body for immigration appeals simply is not to serve as a rubber stamp for immigration judge's decisions. As with all executive officers, litigants are entitled to "reasons" for decisions made. As this Court recently has held and consistently has recognized, an individual challenging executive authority when it comes to due process and liberty interests "may not

be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications" are lawful. *Hamdi et al. v. Rumsfeld, Secretary of Defense et al 03-6696 (July 10, 2004)* (citing *Zadvydas* v. Davis, 533 U. S. 678, 690 (2001); *Addington* v. *Texas*, \441 U. S. 418, 425-427 (1979)). The Court should grant review to consider this question and establish due process limits on the BIA's authority to issue opinions that contain no statement of the reasons underlying the decision.

IV. The Rule 10 Bases For Review

The Courts recently have ruled on the Due Process challenges to the BIA's AWO practice. The First Circuit Court of Appeals in *Albathani v. INS, 318* F.3d 365, held the procedure constitutional, but was prepared to do "a more searching review of the . . . AWO regulations" if there was "evidence of systematic violations. (1st Cir. Feb. 6, 2003). In *Haoud v. Ashcroft*, No. 02-2395, 2003 U.S. App. LEXIS 23993 (1st[th] Cir. Nov. 23 2003), however, the First Circuit found that the BIA's use of the AWO procedure must not interfere with an individual's 'right to a reasoned administrative decision,' but further holding that the BIA's AWO decision provided an inadequate basis for judicial review.

The Second Circuit also has upheld AWO procedure as being constitutional in *El Moraghy v. Ashcroft*, 332 F.3d 195 (1st. 2003). Also, in *Zhang v. Ashcroft*, (2d Cir. March 24, 2004), the Second Circuit upheld the Board of Immigration Appeals' Affirmance Without Opinion procedure, relying on *Arango-Aradondo v. INS*, 13 F. 3d 610, 613 (2d Cir.1994). The Court held that, because neither the INA nor the Constitution requires an administrative immigration appeal to be adjudicated by a three-member

panel of the BIA, the agency was "free to adopt regulations permitting summary affirmance by a single Board member without depriving an alien of due process." The Court also stated that the streamline procedures do not compromise its ability to review the merits because the Court can review the Immigration Judge's decision directly. The Court further reasoned that individuals subject to the AWO procedure are afforded minimum due process protections, namely an immigration hearing, opinion from an immigration judge, appeal to the BIA, and federal court review.

The Third Circuit, in *Dia v. Ashcroft*, No. 02-2460 (3rd Cir. Dec. 22, 2003), sitting en banc found that the BIA's AWO procedure based on its streamlining regulations were not unfair in a constitutional sense.

The Fourth Circuit, in *Khattak v. Ashcroft*, 332 F.3d 250 (4th Cir. 2003) and in *Belbruno v. Ashcroft*, (4th Cir. March 29, 2004), upheld the validity of the Board of Immigration Appeals' Affirmance Without Opinion procedure. The *Belbruno* court stated that the AWO procedure is not inconsistent with the INA because "the INA is simply silent as to what procedures should apply to [an] appeal [to the BIA]." The Court also rejected Petitioner's argument that the AWO procedure violates due process because it fails to provide a decision for the court's review, finding that review of the Immigration Judge's decision provides the "reasoned basis" which the Court could "meaningfully review." The Court also rejected the Petitioner's contention that her due process rights were violated because a single BIA member decided her appeal, stating "there is no magic - and certainly no due process implications - in any given number of reviewing judges." The Court also held that application of the AWO procedures to Petitioner's case did not have a constitutionally impermissible retroactive effect, finding that the procedures

effectuated a "mere regulatory change within the agency's appellate process" that did not attach new legal consequences to past events.

The Fifth Circuit, in *Moin v. Ashcroft*, 335 F.3d 415 (5th Cir. 2003) and *Soadjede v. Ashcroft*, 324 F.3d 830 (5th Cir. 2003) has upheld the BIA's summary affirmance without opinion procedure does not deny an individual due process.

The Sixth Circuit, in *Denko v. INS*, No. 02-3746, 2003 U.S. App. LEXIS 24605 (6th Cir. Dec. 8, 2003) found the AWO procedure permissible on the facts presented in that case, rejecting a general challenge to the AWO regulation on due process and administrative law grounds. In doing so, the Court assumed, without actually deciding, that it could review a challenge to the use of the AWO procedure in a particular case, concluding that it was "doubtful" that the Attorney General had absolute discretion, noting that the regulation itself provides the guidelines by which a Court can review an AWO decision.

The Seventh Circuit, while upholding the procedure in *Georgis v. Ashcroft*, 328 F.3d 962 (7th Cir. 2003) and *Ciorba v. Ashcroft*, 323 F.3d 539 (7th Cir. 2003), has clearly expressed the concerns of "systematic violations" cited by the First Circuit. Judge Posner, in *Niam v. Ashcroft* and *Blagoev v. Ashcroft*, Nos. 02-4292, 03-115 (7th Cir. Jan. 4, 2004) said that there is "a pattern of systematic misapplications by the [BIA] and [immigration judges] of elementary principles of adjudication." Clearly, while the First Circuit first noted this danger, it cautiously averred that the while BIA procedure did involve specific instances of injustice-through streamlining, "one swallow does not make a spring" Since the First Circuit decision, however, the circuits have been flooded with challenges to this procedure.

Respondent submits that the swallows have piled up fast and furious, and request this Court declare that the spring is finally here.

Specifically, In *Dominguez v. Ashcroft*, 336 F.3d 678 (8th Cir. 2003), the Eight Circuit concluded that "summary affirmance does not violate due process or rules of administrative law." *Id.*

The Ninth Circuit, in Falcon Carriche v. Ashcroft (9th Cir. November 24, 2003), held that Board of Immigration Appeals' Affirmance Without Opinion (AWO) procedure does not violate due process, ruling that it does not violate due process for only one member of the Board to decide a Board appeal, nor does it violate due process for that member to affirm the IJ's decision without issuing an opinion. The Court further held, however, that it lacked jurisdiction to evaluate whether the Board appropriately issued an AWO decision in Carriche's case. The Court later denied the rehearing petition that had been filed[5]. Importantly, however, the Court amended its earlier decision to expressly state:

> Although we conclude that we do not have jurisdiction to review the streamlining decision here we express no opinion on whether the BIA may use streamlining procedures for cancellation of removal cases involving hardship decisions. Our opinion should not be read as an endorsement of streamlining in those cases. We also express no opinion on whether, although rare, a truly novel case could arise

[5] Subsequent to the Board's AWO in Carriche, the Attorney General amended the AWO regulation. The third prong of the regulation now requires that the "factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion of the case." 8 CFR § 1003-1(e)(4)(i)(B).

for which a decision to streamline could be found erroneous as a matter of law under the third prong of the BIA regulations. *See 8 C.F.R. § 1003.1(a)(7)(ii)(A).*"

Id.

The Tenth Circuit recently has upheld the constitutionality of these summary affirmance procedures in *Batalova v. Ashcroft*, 355 F.3d 1246, 1253-54 (10th Cir. 2004).

The Eleventh Circuit, in *Mendoza v. U.S. Attorney Gen.*, 327 1283, 1289 (11 Cir. 2003) held that summary affirmance of an alien's removal did not violate due process rights, but in *Gonzalez-Oropeza v. U.S. Attorney General*, 321 F.3d 1331 (11th Cir. 2003), the court held that the BIA member must find the case satisfies three regulatory criteria before he or she can issue an AWO decision, pursuant to 8 C.F.R. § 1003.1(e)(4). Again, the court was silent on this Court's mandate in *Goldberg v. Kelly* that decisions reached by an executive officer must be rational.

The circuit decisions, however, do not address a uniform reason as to why AWO decisions do not violate due process.

V. The Important Question of Federal Law That Has Not Been, But Should Be, Settled By This Court

The use by the Board of Immigration Appeals of decisions without opinions containing no statement of their own reasons underlying the decision raises serious statutory and constitutional issues under federal law. It is a dangerous departure from the accepted and usual course of administrative judicial proceedings.

As this Court noted in *Yamataya v. Fisher*, 189 U.S. 86 (1903), "this court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'" The fact the there exists an explicit statutory safeguard for individuals like respondent demonstrates the importance of protecting his due process rights. As James Madison once said, "[even if] aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them..." 4 Debates Resolutions and Other Proceedings, in Convention on the Adoption of Federal Constitution 556 (Johnathan Elliot, 2nd ed. 1836). To permit 'categorical' exceptions to due process would eviscerate over a century of due process precedent and usher in a radical regime of unfettered government power over thousands of immigrants and their families. Whatever may be the outer boundaries of due process protections, the most basic, long-standing distinction in all of this Court's jurisprudence about the Constitutional status of non-citizens is that between the government's broad authority to determine who may enter the United States versus its more limited power to deport them. The government's attempt to remove Petitioner when he is clearly protected by due process and entitled to a rational, reasoned basis for the government to expel him from America is an unconscionable retrenchment on the constitutional protection of liberty for all persons within the Untied States. In fact, procedural due process always applies during deportation proceedings, "[a]liens who have once passed our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed by virtue of their status and ties to the community, *Zadvydas*, 533 U.S. at 693 quoting *Shaugnessy v. Mezei*, 345 U.S. 206, 212 (1953). The government's own admission of this fact underscores this importance, stating that it "realize[s] that the Board is

often the last recourse before deportation."[6] As such, the Petitioner's right to remain in the Untied States is established as a matter of law.

Finally, there is no reason to believe that this issue is going away any time soon. The BIA's trend toward summary decisions is expected to expand and accelerate even further. There will be a flood of such cases if or when the proposed "restructuring" of the BIA takes effect. Until it is resolved by this Court, there will continue to be significant percentages of the bar and the bench itself who will continue to believe that the circuit courts simply have no statutory or constitutional authority to disturb affirmances without opinions that say nothing about the reasons for its decision. The Court should grant review to resolve this issue once and for all.

CONCLUSION

For the reasons contained herein, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

Christopher William Helt
Counsel of Record
HELT LAW OFFICES
325 West Huron Street
Suite 515A
Chicago, Illinois 60610
(312) 266-0531

July 13, 2004

---

[6] Statement of Board of Immigration Appeals Chairman Lori Scialabba in Letter to Editor of *Los Angeles Times*. January 9, 2003.

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Saleh, Anis N. – Esquire
1 S.E. 3rd Avenue,
Suite 1870
Miami, FL 33131-0000

Office of the District Counsel/MI
155 So. MiamiAve., Rm. 500
Miami, FL 33130

Name: LALJI, AMIN QAMRUDDIN
Riders: 74-855-847 **A93-284-890**

Date of this notice:2 06 2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:
VILLAGELIU, GUS Jeffrey Fratter

000001

U.S. Department of Justice **Decision of the Board of Immigration Appeals**

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A93-284-890 Date: 2/06/2003

In re: LALJI, QAMRUDDIN AMIN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Saleh, Anis N. –Esquire

ON BEHALF OF DHS: Office of the District Counsel/MI

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4)

FOR THE BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11126
Non-Argument Calendar

BIA No. A93-284-890

AMIN QAMRUDDIN LALJI

versus

Petitioner,

U.S. ATTORNEY GENERAL

Respondent,

Petition for Review of a Final Order of the
Board of Immigration Appeals

(April 15, 2004)

Before EDMONSON, Chief Judge, ANDERSON and
WILSON, Circuit Judges

PER CURIAM:

Amin Qamruddin Lalji, a Pakistani national, petitions on behalf of himself and his wife, Shazia, for review of the final order of the Board of Immigration Appeals, which affirmed without opinion the immigration judge's denial of asylum, withholding of removal, and relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment(CAT).[1] Removal proceedings commenced in 1999; so, the permanent provisions of the Immigration and Nationality Act, as mended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), govern this petition. We deny the petition.

Lalji argues that the IJ erred in denying asylum and withholding of removal.[2] Lalji claims he established past persecution based on his affiliation as a member of the Mohajir[3] ethnic and social group and its political

---

[1] Because the BIA affirmed the IJ's decision without opinion, the IJ's decision became the final removal order subject to review. Lonyem v. U.S. Attorney Gen., 352 F. 3d 1338, 1340 (11th Cir. 2003).

[2] Lalji does not challenge the IJ's denial of CAT relief; this issue is abandoned, and we need not consider it. See Mendoza v. U.S. Attorney Gen., 327 F. 3d 1283, 1286 n.3 (11th Cir. 2003).

[3] A Mohajir is an Urdu speaker who was born in what is now India and who migrated to Pakistan at the time of the Partition in 1947-48, or the direct descendant of such a person.

party, the Mohajir Quami Movement (MQM). Lalji points to the detailed account he provided of his 1990 arrest and subsequent two-week period and detention and torture by Pakistani authorities. And he contends, even if he is no longer a member of the MQM, he still harbors a well-founded fear of persecution based on his affiliation with the Mohajir social group.

We must uphold a factual determination that an alien is removable and not entitled to asylum "if it is supported by substantial evidence." Mazariegos v. Office of the U.S. Attorney Gen., 241 F.3d 1320, 1323 (11th Cir. 2001). We may not reverse a denial of asylum unless "the evidence presented by the applicant is so powerful that a reasonable factfinder would have to conclude that the requisite fear of persecution exists." Id. at 1323-24 (emphasis in original).

An alien may obtain asylum if he is a "refugee": a person unwilling to return to his country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 §§ U.S.C. §§ 1101(a)(42)(A), 1158(a)(1), (b)(1).

To establish asylum eligibility, an alien must show with credible evidence (1) past persecution—in this case on account of political opinion or membership in a social group, or (2) a "well-founded fear" that his political opinion or group membership will cause future persecution. 8 C.F.R. § 208.13(a), (b)(1). Although an

asylum applicant's uncorroborated testimony may be sufficient to sustain a claim of asylum and withholding of removal, see 8 C.F.R. 208.13(a), 208.16(b), the IJ in this case found Lalji's testimony as lacking credibility.[4] Substantial evidence supports this conclusion. Most important, Lalji's status as a Mohaijir is in doubt. His testimony was inconsistent with his asylum application about the birthplace of his parents and the timing of his family's emigration from East Pakistan (formerly Bangladesh) to Pakistan: birthplace and time of emigration are key factors in determining Mohajir status. Also his explanation of the circumstances and dates surrounding the issuance of his Canadian visa was inconsistent with the supporting documentation: he failed to explain how this visa was issued the same day he supposedly arrived in Islamabad to request it. And his attempts to enter and reside in the United States were rife with fraudulent behavior.

But even if Lalji had presented credible evidence about his past persecution, substantial evidence supports the IJ's finding that –due to a fundamental change in circumstances—Lalji no longer has a well-founded fear of future persecution. Lalji has not been active in the MQM since his arrest and alleged torture in 1990; the

---

[4] Appellee argues Lalji's failure to challenge the IJ's adverse credibility determination is dispositive and requires us to dismiss the petition. We need not decide this issue; as set forth below, we conclude that substantial evidence supports the IJ's finding that Lalji due to a fundamental change in circumstances had no well-founded fear of future persecution.

party since has splintered into two main groups. Lalji remained in Pakistan for eight months after his arrest and detention without incident. He has returned to Pakistan three times between 1990 and 1998. On his last visit, he got married, an event that involved many invitations to family and friends and heightened his profile in Pakistan.[5] And, although the evidence shows some continuing violence toward MQM members —mostly in connection with active participation in protests or as a result of intra-Mohajir violence, extrajudicial killings of MQM activists have sharply declined since the current regime took power in 1999. We conclude that substantial evidence supports the IJ's determination that Lalji based on a fundamental change in circumstances no longer has a well-founded fear of persecution.[6]

---

[5] Although Lalji did experience difficulty departing from the Karachi airport after his marriage in 1998, he provided two possible explanations: (1) the airport authorities recognized him as having been an MQM activist some eight years earlier; or (2) the airport authorities may have wanted a bribe. The IJ was not required to accept the MQM-related explanation; it is no more plausible than the bribery explanation. And Lalji was not detained or questioned about his involvement with the MQM in connection with this incident.

[6] Because we conclude that Lalji no longer has a well-founded fear of persecution based on a fundamental change in circumstances, we need not address Lalji's argument that the government failed to show sufficiently that he could have relocated safely to another part of Pakistan. See 8 C.F.R. § 208.13(b)(1)(i)(A), (B).

Lalji does not meet the "well-founded fear" standard for asylum: he has not shown why he has met the higher standard for eligibility for withholding of removal. See Najjar V. Ashcroft, 257 F. 3d 1262, 1292-93 (11th Cir. 2001).

Lalji also argues that the Attorney General improperly promulgated and applied retroactively those regulatory modifications which streamlined review an appeal and to affirm summarily the IJ's decision without opinion.

He contends his due process rights were violated because he justifiably relied on his entitlement to three member BIA review and a full BIA opinion when he conceded his removability. He claims that a reduction in the number of Board members increases the chance of an erroneous result.

"We review constitutional challenges de novo." Lonyem v. U.S. Attorney Gen., 352 F. 3d 1338, 1341 (11th Cir. 2003). "To establish due process violations in removal proceedings, aliens must show that they were deprived of liberty without due process of law, and that the asserted errors caused them substantial prejudice." Id. at 1341-42.

Lalji's constitutional claims fail. The application of the BIA's summary affirmance procedures, 8 C.F.R. § 3.1(a)(7)(ii) (redesignated as 8 § C.F.R. 1003.1(a)(7)(ii)), does not violate an alien's due process rights; an alien has neither a constitutional nor a statutory right to an administrative appeal. See Mendoza v. U.S. Attorney Gen., 327 F.3d 1283, 1289 (11th Cir. 2003) (stating that summary affirmance of an alien's removal did not violate due process rights: no entitlement under the regulations to a full BIA opinion).

And the BIA's use of summary affirmance procedure is not impermissibly retroactive as applied to Lalji: this procedure is nothing more than a procedural change. Lalji has received a detailed decision from the IJ, and Lalji has provided no support for his contention that review by a single BIA member—who adjudicates immigration cases regularly—would result in a less accurate result. See INS v. St. Cyr, 121 S. Ct. 2271, 2289-90 (2001) (stating that a statute, to have tetroactive effect, must "attach[] new legal consequences to events completed before its enactment," and that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity"); Khattak v. Ashcroft, 332 F. 3d 250, 252-53 (4th Cir. 2003) (rejecting an identical challenge to the BIA's summary affirmance procedure on retroactivity grounds because "allowing summary opinions in clear cases is nothing more than a procedural change that does not affect substantive rights"). Also Lalji has not suffered substantial prejudice; as stated above, we have concluded that the IJ correctly denied asylum and withholding of removal.

PETITION DENIED.